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Supreme Court, U.S.
FILED

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No. _____

In The

# Supreme Court of the United States

October Term, 1996

TYSON E. TATUM,

*Petitioner,*

v.

VANLINER INSURANCE COMPANY
OF FENTON, MISSOURI,

*Respondent.*

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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29pp

## QUESTION PRESENTED FOR REVIEW

1. Did the United States District Court and the United States Court of Appeals err in granting the Respondent a set-off to the uninsured motorist policy limits from a prior settlement with a different insured joint tortfeasor?

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## CITATION OF OPINION

*Tyson E. Tatum, Appellant v. Vanliner Insurance Company of Fenton, Missouri,* 104 F.3d 223 (8th Cir. 1997)

## BASIS FOR JURISDICTION

1. Judgment was entered January 13, 1997.

2. Petitioner's Motion for Rehearing and Rehearing en banc was denied on February 26, 1997.

3. The statutory provision which confers on this Court jurisdiction to review this matter on a Writ of Certiorari is 28 U.S.C. §1254.

## STATUTE INVOLVED

R.S.Mo. §379.203(1) – No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, or in the case of any commercial motor vehicle, as defined in section 301.010, R.S.Mo., any employer having a fleet of five or more passenger vehicles, such coverage is offered therein or supplemental thereto, in not less than the limits for bodily injury or death set forth in section 303.030, R.S.Mo., for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of

uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. Such legal entitlement exists although the identity of the owner or operator of the motor vehicle cannot be established because such owner or operator and the motor vehicle departed the scene of the occurrence occasioning such bodily injury, sickness or disease, including death, before identification. It also exists whether or not physical contact was made between the uninsured motor vehicle and the insured or the insured's motor vehicle. Provisions affording such insurance protection against uninsured motorists issued in this state prior to October 13, 1967, shall, when afforded by any authorized insurer, be deemed subject to the limits prescribed in this section, to satisfy the requirements of this section.

## STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari for a review of an opinion rendered by the United States Court of Appeals Eighth Circuit. The jurisdiction of the United States District Court was based upon diversity jurisdiction. The Petitioner is a resident of Illinois. The Respondent is a resident of Missouri. There is diversity jurisdiction pursuant to 28 U.S.C. §1332.

This is a claim for personal injuries sustained by the Petitioner, Tyson Tatum, as a result of a collision between two tractor trailers. The collision occurred on October 31, 1990.

At the time of the collision the Petitioner was a passenger in a tractor trailer operated by an individual

named William Tribble. As the Petitioner and Mr. Tribble were traveling Eastbound on Interstate 76, a phantom vehicle, identified only as a red Escort, cut in front of their tractor trailer. As a result of the actions of the Escort, the Tribble tractor trailer was required to slam on his brakes. His tractor trailer was then rear ended by another tractor trailer operated by an individual named Mark Taylor. Mark Taylor was employed by National Carriers. As a result of this collision the Petitioner sustained serious and permanent injuries.

Suit was filed in the State of Kansas against Mark Taylor and National Carriers. As a result of that suit, a settlement was obtained on behalf of the Petitioner in the amount of $150,000.00.

At the time of the collision Tyson Tatum was employed by Hogan Transport. Hogan Transport purchased a policy of automobile insurance from the Respondent, Vanliner Insurance Company of Fenton, Missouri. This insurance policy provided uninsured motorist protection to the Petitioner with policy limits of $50,000.00.

The case at bar involves an uninsured motorist claim against Vanliner Insurance Company of Fenton, Missouri. This cause of action is based upon the negligent acts of the phantom vehicle, identified only as a red Escort.

The Respondent's uninsured motorist policy has the following provision:

> "any amount payable under this insurance shall be reduced by all sums paid by or for anyone who is legally responsible, including all sums paid under the policy's liability coverage".

On January 4, 1996, at the suggestion of the Honorable Charles Shaw, the Respondent filed a Motion to Dismiss. This Motion asserted the above-mentioned policy provision and requested a set-off to its uninsured motorist policy limits and liability from the amount of the prior settlement with Mark Taylor/National Carriers. On January 5, 1996, the Honorable Charles Shaw orally sustained this Motion thereby granting the Respondent the requested set-off. No formal opinion was ever issued.

The Petitioner thereafter filed a timely Appeal to the United States Court of Appeals for the Eighth Circuit. On January 13, 1997, the United States Court of Appeals for the Eighth Circuit rendered its Opinion affirming the decision of the United States District Court.

On January 27, 1997, Petitioner filed his Motion for Rehearing en banc. On February 26, 1997, the United States Court of Appeals denied Petitioner's Motion for Rehearing or Rehearing en banc.

## ARGUMENT

The Petitioner requests this Court to exercise its judicial discretion and grant this Petition for Writ of Certiorari. It is respectfully submitted that the United States Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings or has sanctioned such a departure by the District Court, as to call for an exercise of this Court's supervisory powers.

The District Court's ruling and the Appellate Court's affirmation have violated: 1) A Missouri statute and 2) firmly entrenched Missouri public policy.

The rulings of the United States District Court and the United States Court of Appeals have, for the first time in Missouri law, permitted an uninsured motorist carrier to obtain a set-off from its statutorily mandated uninsured motorist protection from a settlement with a different insured joint tortfeasor. These holdings will eliminate the uninsured motorist protection which is mandated by statute in Missouri. The holdings also violate public policy, and inhibit a Plaintiff from settling with one joint tortfeasor when the remaining joint tortfeasor is an uninsured motorist.

This is a claim for personal injuries when a tractor trailer in which the Petitioner was a passenger was required to slam on its brakes as a result of being cut off by a vehicle identified only as a red Escort. The red Escort then left the scene of the collision and could not be further identified. The Petitioner's tractor trailer was then rear ended by a National Carriers tractor trailer operated by Mark Taylor.

A lawsuit was filed against National Carriers and Mark Taylor and settled for $150,000.00. Thereafter this cause of action was filed against Vanliner Insurance Company of Fenton, Missouri, which provided uninsured motorist protection on the tractor trailer in which the Petitioner was a passenger. The uninsured motorist policy limits were $50,000.00. This cause of action is based upon the negligence of the phantom vehicle identified only as a red Escort.

Uninsured motorist protection in Missouri is governed by R.S.Mo. §379.203. This statute makes uninsured motorist protection in Missouri mandatory. §379.203(1) Provides

> "no automobile liability insurance . . . shall be delivered or issued . . . unless coverage is provided . . . for the protection of the persons insured thereunder who are legally entitled to recover damages from the owners or operators of uninsured motor vehicles . . . "

As can be seen by the above-quoted language, uninsured motorist protection in the State of Missouri is statutorily mandated. When an insurance policy is issued in the State of Missouri it must contain uninsured motorist protection. As such, any policy language which attempts to reduce the sums payable under the uninsured motorist provisions are void as against public policy, *Cano v. Travelers Insurance Company,* 656 S.W.2d 266 (Mo.Banc. 1983); *Douthet v. State Farm Mutual Automobile Insurance Company,* 546 S.W.2d 156 (Mo.Banc. 1977).

Vanliner's uninsured motorist policy provides "any amount payable under this insurance shall be reduced by all sums paid by or for anyone who is legally responsible . . . " This policy language attempts to reduce or eliminate the uninsured motorist protection which is mandated by R.S.Mo. §379.203. If enforced, this provision would completely defeat the specific wording and purpose of the uninsured motorist statute.

Since uninsured motorist protection is mandated and required by statute, any policy language which attempts to restrict or limit the uninsured motorist coverage is void and unenforceable as against public policy. §379.203

" . . . requires that coverage in the amounts required by the safety responsibility law not be diminished by contractual limitation absent express statutory authority . . . it would violate the public policy expressed in §379.203 to permit diminution of coverage . . . ", *Douthet v. State Farm Mutual Automobile Insurance Company,* 546 S.W.2d 156 (Mo.Banc. 1977) at page 159.

There is no language in §379.203 which authorizes a reduction in the uninsured policy limits based upon a settlement with a different insured joint tortfeasor.

The uninsured motorist coverage provides protection for the negligence of the uninsured motorist (the red Escort). The Vanliner uninsured motorist policy provision authorizes a reduction in a statutorily mandated uninsured motorist protection based upon a settlement with a different insured joint tortfeasor (the National Carriers tractor trailer). There is no statutory authority for such a reduction. The holdings of the United States District Court and United States Court of Appeals have permitted an unauthorized diminution of the statutorily mandated uninsured motorist protection.

In the case at bar there are two negligent tortfeasors (one insured and one not insured). There is the National Carriers' tractor trailer (insured) and the red Escort which left the scene of the collision (not insured). The holdings of the District Court and Court of Appeals permit a settlement with the National Carrier tractor trailer to be deducted from the uninsured motorist policy limits (which provided protection to the Petitioner for the negligence of the red Escort). The Appellant is entitled to a

recovery from both joint tortfeasors. To enforce the uninsured motorist policy provision violates the public policy of Missouri

> " . . . the public policy of Missouri now declares that the minimum benefits . . . without diminishment, be available to an insured injured by an uninsured motorist. It also means that the insurance policy provision which designs to restrict the insured from these benefits evades the purpose of the statute and is void as against public policy,"

*Craig v. Iowa Kemper Mutual Insurance Company*, 565 S.W.2d 716 (Mo.App. 1978).

The uninsured motorist benefits, without diminishment, shall be available to an insured injured by an uninsured motorist. The provision at bar, diminishes and eliminates the benefits available to the Petitioner because of injuries resulting from the negligence of the uninsured motorist. Reducing the amount of the statutorily mandated uninsured motorist protection, by the amount of the settlement with the other joint tortfeasor, defeats this specifically stated purpose of §379.203.

The United States Court of Appeals for the Eighth Circuit rendered its decision in *Bernardo v. Northland Insurance Company*, 45 F.3d 272 (8th Cir. 1995). The *Bernardo* Court cited with approval the principles stated in *Otto v. Farmers Insurance Company*, 558 S.W.2d 713 (Mo.App. 1977). While discussing R.S.Mo. §379.203, the *Bernardo* Court cited *Otto* and stated

> "the purpose of the statute is 'to give persons insured by such coverage, when injured by an uninsured motorist, protection parallel to that

> which they would have had if they had been injured in an accident caused by a motor vehicle covered by the minimum liability requirements of the financial responsibility law' ", *Bernardo* page 274.

The United States Court of Appeals' decision conflicts with *Bernardo* and defeats this public policy. To grant the off-set to the uninsured motorist coverage from the coverage of the insured joint tortfeasor would not put the Petitioner in a position where his protection is parallel to that which he would have had if he had been injured by a vehicle which was insured. The cause of action against National Carriers was settled for less than full value because of the negligence of the red Escort. The uninsured motorist policy provision prevents the Petitioner from being in a position where his protection is parallel to that which he would have been if he had been injured by a vehicle which was insured.

If this policy provision is enforced, it will inhibit the ability of all Plaintiffs to settle any claim involving joint tortfeasors (where one of the torteasors is an uninsured motorist). A settlement with the insured tortfeasor will result in a reduction of the policy limits of the uninsured motorist carrier if this policy provision is enforced. The reduction in the uninsured motorist protection will be a circumvention of the Missouri uninsured motorist statute.

Taken a step further, this policy provision will virtually eliminate uninsured motorist protection in the State of Missouri (in cases where there are joint tortfeasors). Let's theorize what would have happened if this claim against National Carriers and the Respondent had been filed in the District Court at the same time. Let's

further theorize that the jury proportioned damages in the following amounts: $150,000.00 against National Carriers and $50,000.00 against Vanliner. The Respondent would then assert that because of the recovery from National Carriers (and the policy provision), there is an off-set and no recovery to the Petitioner from the Respondent's uninsured motorist policy. This result clearly circumvents the purpose of the Missouri legislature passing the uninsured motorist statute.

If this policy provision is enforced all insurance companies will place this provision in their uninsured motorist policies. The result will be the elimination of uninsured motorist protection in situations involving joint tortfeasors. This inevitable result is precisely why the Court of Appeals' ruling has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power. The holding of the Court of Appeals sanctioned this same departure by the District Court and once again calls for the exercise this Court's supervisory power.

The United States Court of Appeals for the Eighth Circuit based its ruling primarily on the case of *Ragsdale v. Armstrong*, 916 S.W.2d 783 (Mo.Banc. 1996). It is respectfully submitted that *Ragsdale* does not provide a basis for the Appellate Court's Opinion at bar. *Ragsdale* dealt with uninsured motorist protection for the negligence of an individual who was actually insured. In *Ragsdale*, the Defendant (Armstrong) had a policy of insurance but for less than the minimum required by Missouri statutes. This fact caused the Missouri Supreme Court to become divided as to whether Armstrong was, in fact, an uninsured motorist. The fact that Armstrong

had insurance (but for less than the required amount) is precisely why the Missouri Supreme Court off-set Armstrong's insurance coverage from the uninsured motorist coverage. Once the tortfeasor's insurance company paid its policy limits the Missouri Supreme Court granted additional protection to the Plaintiff for the difference between the tortfeasor's policy limit and the uninsured motorist policy limit.

In *Ragsdale* there was but one tortfeasor. The fact that there are joint tortfeasors in the case at bar make *Ragsdale* inapplicable. The uninsured motorist coverage provides protection for the negligence of the red Escort, not for the negligence of the tractor trailer. There is no authority for taking a settlement with one tortfeasor and reducing the policy limits for a second joint tortfeasor.

Insurance companies have attempted to restrict the mandated uninsured motorist protection through policy provisions on multiple occasions. In each instance the Missouri Court of Appeals and Supreme Court have denied their ability to restrict or limit uninsured motorist coverage. Insurance companies have attempted to have a set-off of uninsured motorist protection from Workers' Compensation benefits. These provisions were held to be invalid, *Douthet* page 159, *Cano v. Travelers Insurance Company*, 656 S.W.2d 266 (Mo.Banc. 1983).

Insurance companies have attempted to circumvent the uninsured motorist statute by inserting policy provisions which provide for a set-off of uninsured motorist protection by medical pay payments which are made under the same policy. This policy provision was once again held invalid and void as against public policy, *Webb*

*v. State Farm Mutual Automobile Insurance Company*, 479 S.W.2d 148 (Mo.App. 1972).

Insurance companies have, on numerous occasions attempted to restrict the mandated uninsured motorist protection by anti-stacking provisions contained within their policies. The Missouri Court of Appeals have uniformally held that so long as an individual is a named insured, anti-stacking provisions are unenforceable as against public policy, *Famuline v. Farmers Insurance Co. Inc.*, 619 S.W.2d 894 (Mo.App. 1981); *Galloway v. Farmers Insurance Co. Inc.*, 523 S.W.2d 339 (Mo.App. 1975).

As demonstrated in this Petition for Writ of Certiorari, the holdings of the United States District Court and United States Court of Appeals for the Eighth Circuit (enforcing this policy provision): 1) violated and defeated the specific stated purpose of the Missouri uninsured motorist statute and 2) conflict with the Eighth Circuit Court of Appeals' Opinion of *Bernardo v. Northland Insurance Company*, violating firmly entrenched Missouri Public Policy. The result of enforcing this policy provision will be adoption of this policy provision industry wide by insurance companies. This policy provision will result in the elimination of uninsured motorist protection in cases involving joint tortfeasors. It is respectfully submitted that the United States Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings (and sanctioned such a departure by the District Court) so as to call for an exercise of this Court's supervisory powers.

WHEREFORE, Petitioner requests this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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**APPENDIX**

**United States Court of Appeals**

**FOR THE EIGHTH CIRCUIT**

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No. 96-1391

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| | | |
|---|---|---|
| Tyson E. Tatum,<br>Appellant,<br>v.<br>Van Liner Insurance Company of Fenton, Missouri,<br>Appellee. | * | Appeal from the United States District Court for the Eastern District of Missouri. |

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Submitted: September 13, 1996

Filed: January 13, 1997

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Before WOLLMAN, ROSS and HANSEN, Circuit Judges.

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ROSS, Circuit Judge.

Appellant Tyson Tatum appeals from the district court's[1] judgment entered in favor of appellee Van Liner Insurance Company on his personal injuries claim based

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[1] The Honorable Charles A. Shaw, United States District Judge for the Eastern District of Missouri.

on Van Liner's uninsured motorist coverage provision. We affirm.

On October 31, 1990, appellant was a passenger in a tractor trailer driven by William Tribble and owned by Hogan Transport, Inc. Tribble was forced to stop suddenly when an unknown vehicle, identified only as a red Ford Escort, swerved in front of the truck. When Tribble applied his brakes, the truck he was driving was struck from the rear by a second tractor trailer, driven by Mark Taylor. Appellant sustained serious and permanent injuries as a result of the accident, and he subsequently filed suit against Taylor and Taylor's employer, National Carriers. Appellant eventually received $150,000 in settlement of this claim.

Appellant then brought the present action against Van Liner Insurance Company, seeking sums under the uninsured motorist (UM) provision of a policy of insurance issued by Van Liner to Hogan Transport. The policy provided UM coverage in the amount of $50,000. The UM provision stated:

> Any amount payable under this insurance shall be reduced by all sums paid by or for anyone who is legally responsible, including all sums paid under the policy's liability coverage.

In its answer, Van Liner asserted as an affirmative defense that appellant had received in settlement an amount exceeding Van Liner's UM coverage and, therefore, pursuant to the policy setoff language, appellant was not entitled to additional sums under the Van Liner policy. Tatum moved to strike the affirmative defense based on the collateral source rule. The district court

denied appellant's request to strike and granted Van Liner's motion to dismiss[2] based on its setoff claim.

On appeal, Tatum argues there is no authority to support a setoff to the uninsured motorist policy limits from a settlement with another joint tortfeasor. Although Missouri law generally holds that "[t]he statutory policy of Missouri forbids impairment of the prescribed minimum uninsured motorist coverage by another policy provision attempting to limit liability," *Webb v. State Farm Mut. Auto. Ins. Co.*, 479 S.W.2d 148, 154 (Mo. Ct. App. 1972), Missouri courts have never addressed the issue presently before this court, namely whether an injured motorist may recover under a UM provision when he has already recovered far in excess of the statutory minimum UM amount from an insured motorist.

In *Ragsdale v. Armstrong*, 916 S.W.2d 783 (Mo. 1996) (en banc), the defendant/tortfeasor had liability insurance in the amount of $10,000, well below the $25,000 minimum liability coverage required by the Motor Vehicle Financial Responsibility Law. *See* Mo. Rev. Stat. § 303.030.5 (providing that any Missouri automobile liability insurance policy must provide minimum coverage of $25,000 per person/$50,000 per accident). In a plurality opinion, the Missouri Supreme Court held that because the tortfeasor's liability policy did not meet the statutory minimum, the plaintiff qualified as an uninsured motorist and was allowed to recover under his two UM policies.

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[2] Because the district court considered evidence outside the pleadings in order to arrive at its decision, the court's ruling was, in effect, an order of summary judgment and we consider it such on appeal. Fed. R. Civ. P. 12(b).

Although the plaintiff's combined UM coverage under the two policies contractually provided $150,000 in coverage, the majority allowed the plaintiff to recover only up to the $25,000 statutory minimum provided under Missouri law, or a total UM coverage of $50,000 under the two policies. Moreover, from this $50,000 minimum coverage under the two UM policies, the court subtracted the $10,000 already recovered from the inadequately insured tortfeasor.

Viewing the *Ragsdale* opinion as a whole, it offers very little guidance by the Supreme Court of Missouri, other than the end result which was to allow the setoff of UM coverage by other insurance recoveries. Though it is somewhat enigmatic, we read *Ragsdale* as an indication that the Missouri Supreme Court will allow recovery under a UM policy, even when the plaintiff has received some recovery under a motor vehicle liability policy, but only up to the statutory minimum, reduced by the amount already recovered. The focus in *Ragsdale* and the UM provision of Mo. Rev. Stat. § 379.203 is to ensure that an injured motorist has available at least the statutory minimum amount of recovery required by the Motor Vehicle Financial Responsibility Law, Mo. Rev. Stat. § 303.030.5. Because appellant in the present case has already received far in excess of the statutory minimum, the public policy of Missouri's UM statute is satisfied. As the setoff policy provision at issue here will not serve to reduce the statutorily-required minimum insured motorist coverage, we conclude the provision as applied does not conflict with public policy or Missouri law, and thus is valid. *See Douthet v. State Farm Mut. Auto. Ins. Co.*, 546 S.W.2d 156, 159 (Mo. 1977) (en banc).

We also reject appellant's argument that Van Liner's setoff defense is barred by the collateral source rule. As an exception to the general rule that damages in tort should be compensatory only, the collateral source rule permits recovery against a wrongdoer for the full amount of damages even though the plaintiff is also compensated from a different source which is "wholly independent" of the wrongdoer and whose payment is therefore collateral to his. *Overton v. United States*, 619 F.2d 1299, 1306 (8th Cir. 1980). Under this rule, "a wrongdoer" is not entitled to have damages for which he is liable reduced by amounts received by the claimant from a collateral source. *Id.* However, the application of the collateral source rule depends on proof that the plaintiff has contributed to the fund he claims as a collateral source. *Id.* at 1305-06. "The policy behind the collateral source rule simply is not applicable if the plaintiff has incurred no expense, obligation, or liability in obtaining the services for which he seeks compensation." *Washington v. Barnes Hosp.*, 897 S.W.2d 611, 620-21 (Mo. 1995) (en banc) (citing with approval *Florida Physician's Ins. Reciprocal v. Stanley*, 452 So.2d 514, 515-16 (Fla. 1984)).

We conclude the district court did not err in denying appellant's motion to strike and in granting judgment in favor of Van Liner. The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

No. 96-1391EMSL

| | | |
|---|---|---|
| Tyson B. Tatum,<br><br>Appellant,<br><br>vs.<br><br>Van Liner Insurance Company of Fenton, Missouri,<br><br>Appellee. | * | Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc |

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 26, 1997

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court Appeals, Eighth Circuit

## APPENDIX

## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

| | | |
|---|---|---|
| TYSON E. TATUM,<br>Plaintiff,<br>vs.<br>VANLINER INSURANCE COMPANY OF FENTON, MISSOURI,<br>Defendant. | ) | Granted<br>CAS<br><br>Cause No: 4:94CV1695CAS<br><br>1/5/96 |

## MOTION TO DISMISS PLAINTIFF'S COMPLAINT

COMES NOW defendant, Vanliner Insurance Company of Fenton, Missouri, and moves this Court for an order dismissing Plaintiff's complaint for failure to state a claim upon which relief can be granted and for grounds of said motion states:

1. On October 31, 1990, plaintiff was a passenger in a tractor trailer operated by Hogan Transport and driven by a co-employee on a delivery to Massachusetts when an unidentified motor vehicle described as a Ford Escort merged into plaintiff's lane of travel in front of plaintiff's vehicle, and a tractor trailer operated by Mark Taylor collided with the rear end of the motor vehicle in which plaintiff was a passenger causing plaintiff to sustain injury.

2. At the time of the collision, plaintiff was covered by a policy of liability insurance issued by Vanliner Insurance Company to Hogan Transport, policy number

BA00254200 which provided uninsured motorists benefits to Mr. Tatum in the amount of Fifty Thousand Dollars ($50,000.00).

3. After this accident plaintiff filed with the United States District Court for the District of Kansas a civil action for personal injuries against Mark Taylor and his employer, National Carriers, bearing cause number 92-4244. This lawsuit was settled by plaintiff against both defendants for the amount of $150,000.00.

4. Vanliner Insurance Company's policy provides:

> Any amount payable *under this insurance* shall be reduced by all sums paid by or for anyone who is legally responsible, including all sums paid under the policy's liability coverage.

(emphasis added). A copy of this provision is attached hereto and incorporated herein as Exhibit A.

5. Missouri courts have construed policy terms such as the above-referenced set-off provision to be unambiguous, valid and enforceable. *American Economy Insurance Co. v. Cornejo,* 866 S.W.2d 174, 178 (Mo.App. 1993), *Keating v. Gavrilovici,* 861 S.W.2d 205 (Mo.App. 1993). Under this term, defendant is entitled to set-off the $50,000.00 payable under the policy by the $150,000.00 already received by plaintiff.

6. Said set-off reduces the amount payable to plaintiff to zero. Plaintiff cannot recover any amount under defendant's uninsured motorist coverage.

**WHEREFORE,** Defendant Vanliner Insurance Company respectfully request [sic] that this court enter its

order dismissing Plaintiff's Complaint and for such other and further relief as this court deems just and proper.

A copy of the foregoing was faxed this 4th day of January, to: James F. Koester, Attorney for Plaintiff, 8000 Clayton Road, St. Louis, Missouri 63117.

Respectfully Submitted,

/s/ B R Plegge
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Fax # (314) 421-5640

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EXHIBIT A

ENDORSEMENT NO. CA 21 04 – MO UNINSURED MOTORISTS COVERAGE

MISSOURI UNINSURED MOTORISTS COVERAGE

STRUCK BY ANY VEHICLE OWNED BY YOU OR ANY "FAMILY MEMBER" THAT IS NOT A COVERED "AUTO." HOWEVER, THIS EXCLUSION DOES NOT APPLY TO YOU.

4. ANYONE USING A VEHICLE WITHOUT A REASONALBE [sic] BELIEF THAT THE PERSON IS ENTITLED TO DO SO.

5. PUNITIVE OR EXEMPLAARY [sic] DAMAGES.

D. LIMIT OF INSURANCE

1. REGARDLESS OF THE NUMBER OF "INSUREDS," PREMIUMS PAID, CLAIMS MADE OR VEHICLES INVOLVED IN THE "ACCIDENT," THE MOST WE WILL PAY FOR ALL DAMAGES RESULTING FROM ANY ONE "ACCIDENT" IS THE LIMIT OF UNINSURED MOTORISTS COVERAGE SHOWN IN THE DECLARATIONS.

   HOWEVER, IF "BODILY INJURY" TO WHICH THIS COVERAGE APPLIES IS SUSTAINED BY ANY PERSON OTHER THAN YOU OR ANY "FAMILY MEMBER," THE LIMIT OF INSURANCE SHOWN IN THE DECLARATIONS FOR THIS COVERAGE IS ALSO THE MOST WE WILL PAY REGARDLESS OF THE NUMBER OF COVERED "AUTOS."

2. ANY AMOUNT PAYABLE UNDER THIS INSURANCE SHALL BE REDUCED BY ALL SUMS PAID BY OR FOR ANYONE WHO IS LEGALLY RESPONSIBLE. INCLUDING ALL SUMS PAID UNDER THE POLICY'S LIABILITY COVERAGE.

3. ANY AMOUNT PAID UNDER THIS INSURANCE WILL REDUCE ANY AMOUNT AN "INSURED" MAY BE PAID UNDER THE POLICY'S LIABILITY COVERAGE.

E. CHANGES IN CONDITIONS

THE CONDITIONS ARE CHANGED FOR MISSOURI UNINSURED MOTORISTS COVERAGE AS FOLLOWS:

1. THE REFERENCE IN OTHER INSURANCE TO "OTHER COLLECTIBLE INSURANCE" APPLIES ONLY TO OTHER COLLECTIBLE UNINSURED MOTORISTS INSURNACE. [sic]

2. DUTIES IN THE EVENT OF ACCIDENT. CLAIN, [sic] SUIT OR LOSS IS CHANGED BY ADDING THE FOLLOWING:

   A. PROMPTLY NOTIFY THE POLICE IF A HIT-AND-RUN DRIVER IS INVOLVED AND

   B. PROMPTLY SEND US COPIES OF THE LEGAL PAPERS IF A "SUIT" IS BROUGHT.

3. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US IN CHANGED BY ADDING THE FOLLOWING:

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## STATUTE INVOLVED

R.S.Mo. §379.203(1) – No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registerd [sic] or principally garaged in this state unless coverage is provided therein or supplemental therto [sic], or in the case of any commercial motor vehicle, as defined in section 301.010, RSMo, any employer having a fleet of five or more passenger vehicles, such coverage is offered therein or supplemental thereto, in not less than the limits for bodily injury or death set forth in section 303.030, RSMo, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. Such legal entitlement exists although the identity of the owner or operator of the motor vehicle cannot be established because such owner or operator and the motor vehicle departed the scene of the occurrence occasioning such bodily injury, sickness or disease, including death, before identification. It also exists whether or not physical contact was made between the uninsured motor vehicle and the insured or the insured's motor vehicle. Provisions affording such insurance protection against uninsured motorists issued in this state prior to October 13, 1967, shall, when afforded by any authorized insurer, be deemed subject to the limits prescribed in this section, to satisfy the requirements of this section.